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South Carolina's amended employment-at-will statute: Background and recommendations for employers

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Background



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For almost all of the 20th century, employees in South Carolina were employed “at-will.” This meant that in the absence of a contract of employment for a definite period of time, every other employer-employee relationship existed for no fixed period of time, and that both the employer and the employee could terminate the relationship for a good reason, a bad reason, or even no reason at all. Of course, this “at will” relationship was subject to the requirements of various federal and state laws that prohibited the termination of employment for the reasons stated therein (Title VII, ADEA, ADA, etc.).

Beginning in 1985 the South Carolina Supreme Court began making exceptions to employment at will. In a case known as Ludwick v. This Minute of Carolina, Inc. (1985), our Supreme Court held that “where the retaliatory discharge of an at-will employee constitutes a violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises.” While this “public policy” exception to employment at will was the first recognized by our courts, it has not given rise to as much difficulty for employers as has the second exception to employment-at-will, which was created by our Supreme Court in 1987.

In Small v. Springs Industries, Inc. (1987), our Supreme Court broke with precedent and held that an employee handbook could constitute a contract of employment in the absence of a conspicuous disclaimer. This led to a barrage of cases in which our Supreme Court made it more and more difficult for a disclaimer to be “conspicuous.” Employers were first instructed to put the disclaimer on the first page of the handbook. In subsequent cases, they were required to bold the letters of the disclaimer, capitalize the letters of the disclaimer, enlarge the type size of the letters of the disclaimer, underline the letters of the disclaimer, print the disclaimer in a different font type, place it

in a box, and do various other things to ensure the conspicuous nature of the disclaimer.

When employers were finally able to do so much to a disclaimer that everyone had to admit it was conspicuous, a new issue emerged. The new issue focused on the use of “promissory” language within the handbook. The South Carolina Supreme Court held that where a handbook had both a conspicuous disclaimer and promissory language (words such as “will,” “shall,” “must,” etc.), that a conflict was created. On the one hand the employer was saying there were no contractual provisions or promises, but on the other hand the employer was promising something. According to the court, this inconsistency had to be resolved on a case-by-case basis by the jury. Juries were then required to decide whether the disclaimer overrode the promise, or whether the promise overrode the disclaimer. Thus we set about trying to remove much of the promissory language from employee handbooks. As an offshoot from this line of cases, the South Carolina Supreme Court also held that an employer’s handbook statement that it wished to engage in “fair” treatment of its employees was also a promise which would justify an employee going before a jury.

Finally, the most recent blow to employment-at-will in South Carolina occurred in 2003. In that year, the South Carolina Supreme Court held that an employer who included an equal employment opportunity or anti-harassment policy in his handbook was not merely restating applicable federal and state law, but was actually promising or contracting with his employees to provide a workplace free of discrimination and harassment. Something had to change.

House of Representatives bill H.3448

Various Chambers of Commerce, industry groups, and others lobbied long and hard for the legislature to come in and fix the mess that had been created by the South Carolina Supreme Court. The House then drafted and passed a very good bill known as H.3448. This multi-section bill clearly stated that employment-at-will was the law of South Carolina, that at-will employees could not bring claims for breach of contract, and that handbooks, policies, procedures or other documents issued by employers were not contracts of employment unless the employer and employee took certain steps. Those steps provided for the creation of a contract only where the contract was in writing, signed by the employee and an authorized agent of the employer, and the contract expressly provided that the parties intended to alter their at-will relationship.

Once passed by the House, this bill languished in the Senate for over a year. What came out of the Senate near the end of this legislative term was frankly not that good. H.3448 as it escaped from the Senate and was ratified by the House and signed by the Governor contains only one section. The law reads as follows:

It is the public policy of this state that a handbook, personnel manual, policy, procedure, or other documents issued by an employer or its agent after June 30, 2004 shall not create an express or implied contract of employment if it is conspicuously disclaimed. For the purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined, capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined, capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.

Recommendations for employers

Carefully review all handbooks, policies, procedures, manuals, etc., both in hard copy and as they may appear electronically on the company intranet or the Internet. Employers who continue to use promissory language in these documents may be faced with lawsuits based on theories other than breach of contract. Possible theories include detrimental reliance, promissory estoppel, or fraud if the employer deviates from its own policies.

An interesting issue that arises for employers who maintain their policies only in electronic form is the signature requirement contained in H.3448. Among the many problems in that statute is the fact that the statute doesn't address at all policies contained on a website or intranet. It does require that the disclaimer be "signed by the employee." The South Carolina Electronic Commerce Act, South Carolina Code Annotated §§ 26-5-10, et. seq., addresses the requirements for electronic signatures. In particular, § 26-5-510 through § 26-5-540 deal with electronic signatures. If employees could use one of the three methods established by §26-5-510 to sign a disclaimer electronically that apparently would be acceptable under H.3448. However, employees could challenge his or her electronic signature by asserting that some other person, such as someone in an employer's Information Technology department, actually affixed the electronic signature to the document. Therefore, even if an employer goes with an all-electronic policy format, we recommend that employees sign a duplicate identical

copy of the disclaimer that will appear at the beginning of the collection of electronic policies. Employers should keep a hard copy of the signed disclaimer.

Revoke all current handbooks, policy manuals, policies, etc. in their electronic and written forms. Come up with a disclaimer document that contains suitable language to inform employees of the revocation of all prior documents in the issuance of the employer's new handbook, manual, policies, etc. When some component of an employer's workforce has employment contracts, tenure agreements, or other such individual contracts, a separate form will need to be devised for these employees.

If the handbook, manual, or policies are to be maintained electronically, devise screens that must appear before employees are allowed to access any particular policy. This screen should once again contain the disclaimer, and notify the employee that he is not authorized to proceed further unless he has previously signed a hard copy of the language that appears on the screen and returned it to the Human Resources Department. Only when the employee acknowledges this is he able to click the appropriate link and proceed further into the electronic policies.

There is nothing wrong with repetition. Consider having every page of a manual, handbook, or policy refer back to the disclaimer.

Documents other than employee handbooks or personnel manuals, such as policies, procedures, etc., must also contain a disclaimer on the first page, underlined and in capital letters.

Make sure the employer has in each employee's personnel file signed copies of the revocation of all previous policies, disclaimer documents, and employment-at-will statements. There is nothing wrong with getting this done on a periodic basis. Many employers may be familiar with this procedure if they follow currently recommended practice and educate all employees periodically on other important policies, such as harassment policies.